Supreme Court, U.S.
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No. 93-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT W. GUTHRIE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the purchase of real property, not shown to have a substantial *effect* on interstate commerce, can be the subject of a criminal prosecution under the Sherman Act on the ground that it is "in the *flow* of interstate commerce"?

2. Whether an agreement to suppress bidding at a foreclosure sale is a "contract, combination . . . or conspiracy in restraint of trade or commerce among the several States" where all of the parties to the agreement and to the sale are citizens of the state in which the property is located and the sale occurs?

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OPINIONS BELOW

Neither the memorandum opinion of the court of appeals, Appendix pp. 1a-7a, nor the order denying rehearing, Appx. p. 27a, is reported. The opinion of the district court on post-trial motions, Appx. pp. 8a-26a, is reported at 814 F. Supp. 946 (E.D. Wash. 1993).

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1994. Appx. p. 1a. A timely petition for rehearing was denied on March 24, 1994. Appx. p. 27a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves a criminal conviction under Section 1 of the Sherman Act, which provides in relevant part as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.

15 U.S.C. § 1.

STATEMENT OF THE CASE

On two occasions petitioner Robert Guthrie purchased real property at foreclosure sales. At each sale Guthrie paid other parties not to bid; the total amount of the payments in each case was approximately $2000.[1] Guthrie purchased each parcel for $1 more than its "adjusted fair market value" established by the Government, which was well under $35,000 in each instance. After fixing up the abandoned houses on the properties, Guthrie resold them for a profit that the trial court found was less than $5000.

Apparently having nothing better to do, the United States charged Guthrie with two criminal felony violations of the Sherman Act, 15 U.S.C. § 1. It asserted that each of these arrangements constituted a separate "bid-rigging" conspiracy "in restraint of trade or commerce among the several States." The jurisdiction of the district court was based on 18 U.S.C. § 3231.

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[1] Guthrie had heard of this practice from his father-in-law. Before he engaged in it two different lawyers told him that they saw nothing wrong with it. Guthrie made his arrangements at the sales openly, with no effort at concealment. There was no evidence suggesting that he or the other participants believed they were doing anything wrong. Tr. 618-628, 638-640. The trial court ruled that good faith was no defense and granted the Government's motion to prevent Guthrie from presenting evidence that he believed his acts were legal. *See* Appx. pp. 25a-26a.

Although the buyer and the sellers of the property were all residents of Washington state, where the property was located and the sales occurred,[2] the Government asserted that the matter fell within the scope of the Sherman Act because (1) the foreclosures were initiated by out-of-state lenders, who later received a portion of the sale price, and (2) the balance of the indebtedness was insured and paid by the Department of Housing and Urban Development.[3]

At trial Guthrie presented evidence that neither transaction had more than a trivial effect on interstate commerce. Tr. 253-267. In response the Government disavowed its "affecting commerce" theory of jurisdiction in a successful effort to exclude further evidence of the insubstantiality of any effect on commerce. Tr. 267-268, 343, 461. The case proceeded solely on the theory that the alleged conspiracies were "in commerce," or "in the flow of commerce," as the test is sometimes described. *See* Appx. p. 11a.

Over Guthrie's objection, the trial court instructed the jury to find that the necessary connection with interstate commerce existed if the sales constituted an "essential part of [a] foreclosure transaction involving the transfer of funds from the State of Washington to [another state]." Appx. p. 17a. The court further instructed the jury that the magnitude of the commerce restrained was unimportant. *Id.*

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[2] The alleged co-conspirators were also Washington residents, as were the trustees under the deeds of trust.

[3] There was no evidence that Guthrie knew or cared where the lenders were located or which HUD office wrote the checks to pay their claims for the deficiencies. Guthrie paid for the properties with cashier's checks from Washington institutions. The trustees conducting the sales deposited these checks in other Washington institutions, deducted their fees, and wrote new checks to the lenders for the balance.

The jury returned a verdict of guilty on each count. Guthrie was fined and placed on probation. The Ninth Circuit affirmed, ruling that the "movement of money across state lines incidental to a real estate transaction . . . constitute[s] interstate commerce." Appx. p. 6a. Apparently this fact was sufficient, in that court's view, to sweep into "the flow of interstate commerce" all those local players whose participation was a but-for cause of the subsequent interstate movement of funds, and to make irrelevant the Government's failure to prove that Guthrie's activities, allegedly in restraint of trade, had or could have had any substantial effect on interstate commerce. *Id.* Guthrie's petition for rehearing was denied. Appx. p. 27a. This petition followed.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with this Court's decisions on when a transaction is "in the flow of interstate commerce" and when a Sherman-Act conspiracy is "in restraint of trade or commerce among the several States."

2. It reflects the continuing confusion in the lower courts over the extent to which the antitrust laws reach activities of a local nature—confusion that was largely created by this Court's decision in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), and that was not resolved by the decision in *Summit Health, Ltd. v. Pinhas*, 114 L.Ed.2d 366 (1991).

3. It demonstrates the trivialization of the Sherman Act against which the four dissenting Justices warned in *Summit Health*.

4. It raises issues similar to those presented by *United States v. Lopez*, No. 93-1260, *cert. granted*, 62 U.S.L.W. 3690 (April 18, 1994), involving the constitutionality of 18 U.S.C. § 922(q), prohibiting possession of firearms at or near schools.

ARGUMENT

A. This Court's Cases on Sherman-Act Jurisdiction Are Themselves in Conflict, Causing Conflict and Confusion in the Lower Courts.

On the one hand this Court has often said that in adopting the Sherman Act, Congress intended to exercise the full extent of its power under the Commerce Clause. *E.g., Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738 (1976). On the other hand, in order to decide whether an alleged conspiracy actually meets the statutory test of being "in restraint of trade or commerce among the several States," this Court has analyzed whether the defendant's alleged restraint was "in commerce" or had a "substantial effect on" interstate commerce, in purpose or effect. *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980).[4]

Numerous commentators have found these approaches to be inconsistent.[5] Many economic transactions of a type that, in the aggregate, could be regulated by Congress under the Commerce Clause,[6] nevertheless are not themselves "in commerce" and do not individually have a "substantial effect" on such commerce. *E.g.*, Busey &

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[4] The conceptual distinction between activities "in" interstate commerce and those which "affect" interstate commerce has been preserved in the cases . . . . It can no longer be doubted, however, that the jurisdictional requirement of the Sherman Act may be satisfied under either the "in commerce" or the "effect on commerce" theory.

McLain, supra, 444 U.S. at 241-242.

[5] *See, e.g.*, Calkins, *The 1990-91 Supreme Court Term and Antitrust: Toward Greater Certainty*, 60 Antitrust L.J. 603, 621 n.93 (1992) (Judge Easterbrook characterizes the assertion that the Sherman Act exercises Congress' full powers under the Commerce Clause as "oft-repeated, but ne'er followed").

[6] *See Perez v. United States*, 402 U.S. 146 (1971); *Wickard v. Filburn*, 317 U.S. 111 (1942).

Freeman, *The View from the Summit: Jurisdiction and Beyond*, 60 Antitrust L.J. 725 (1992). As four Justices noted in dissent in *Summit Health, Ltd. v. Pinhas*, 114 L.Ed.2d 366, 377-378 (1991), the result of this apparent inconsistency has been confusion and conflict among the circuits.[7]

B. The Holding Below that Local Real Estate Sales Were "In Interstate Commerce" Conflicts with This Court's Decisions.

A classic example of a purely local transaction with at most an insubstantial effect on interstate commerce is an isolated sale of a small parcel of real property. This is particularly clear in this case, where buyers and sellers were all residents of the state where the property is located and the sales were held, although those facts are not critical.[8]

As Guthrie's trial the Government abandoned any effort to prove that Guthrie's activities had a "substantial effect on" interstate commerce. Appx. p. 11a. However the Government argued, and the Ninth Circuit agreed, that they were "in commerce."

The "in commerce" test is "relatively restrictive." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 198

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[7] The resolution of the apparent inconsistency may lie in the distinction between case-by-case determinations under the Sherman Act and situations where Congress has expressly defined a class of persons and activities that affect commerce. This Court has stated that its inquiry "differs significantly" in these two situations. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 197 n.12 (1974). *See* p. 12 below.

[8] "The facts that the property sold is outside of the state, and the seller and buyer foreigners, are not enough to make a sale commerce with foreign nations or among the several states, and that is all there is here." *New York ex rel. Hatch v. Reardon*, 204 U.S. 152, 162 (1907) (Holmes, J.). For the same reason, the fact that the sales in this case were initiated by out-of-state lenders does not make the sales "commerce . . . among the several States."

(1974). In *United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975), this Court held:

> To be engaged "in commerce" . . . a corporation must *itself* be directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce.

422 U.S., at 283 (emphasis added). It was not enough in *American Building Maintenance* that the defendant did business with others who were engaged in such commerce.

Similarly, in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980), the Court held that to establish Sherman Act jurisdiction a plaintiff must show

> either that *the defendants' activity is itself* in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce.

444 U.S., at 242 (emphasis added). (The "or" alternative is the "affecting commerce" test, which was concededly not met in this case.)

Since Guthrie's activity was itself local in nature, it was not "in the flow of interstate commerce." It did not become part of interstate commerce by being part of an "interstate foreclosure transaction." Not only is this an inappropriate characterization;[9] such transactions are

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[9] Guthrie was not purchasing "foreclosures"; he was purchasing real estate. The fact that the seller was forced to sell, and the use made of the proceeds of sale, were quite irrelevant to him. From his perspective, this was a real estate transaction, pure and simple.

This is also the correct perspective. "Interstate commerce" is the interstate flow of *goods* and *services*. The use made of the proceeds by the seller has never been thought relevant to the analysis. *Cf. United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974).

themselves not interstate commerce. *See New York ex rel. Hatch v. Reardon, supra* note 8. The decision below conflicts with the holdings of *ABMI* and *McLain*.

C. The Lower Court's Error Was Caused by the Confusion in This Court's Decisions.

The court below felt that the sales were "in commerce" because they were essential to the subsequent interstate flows of funds. Appx. p. 6a. It relied on the characterization of *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), in *McLain v. Real Estate Board, supra*, 444 U.S. 232 (1980), in support of this proposition. *Id.*, n.1. The Ninth Circuit's error was in part the result of *McLain*'s mischaracterization of *Goldfarb*.

Goldfarb was a class action challenging a state bar's minimum fee schedule for title examinations. The case was tried and decided on the theory that the challenged restraint substantially "affected interstate commerce," specifically interstate real-estate lending and title insurance. *See id.* at 778 n.8, 785.

In *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), the Court surprisingly described *Goldfarb* as having been based on the ground "that the activities of the attorneys were *within* the stream of interstate commerce." 444 U.S., at 244 (emphasis added). According to the *McLain* Court, "The *Goldfarb* holding was not addressed to the 'effect on commerce' test of jurisdiction . . . ." *Id.*

This statement was simply and undeniably wrong.[10]

The effect of the error in *McLain* was to confuse the distinction between activities "in interstate commerce"

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[10] *E.g.*, "[W]e conclude that interstate commerce has been *sufficiently affected*." *Goldfarb v. Virginia State Bar, supra*, 421 U.S. at 785 (emphasis added; footnote omitted). Several other passages from *Goldfarb* could be quoted to establish the same point.

and those that simply "affect commerce." This distinction is important because in the latter class of cases the Sherman Act applies only when the effect on commerce is "substantial." *McLain v. Real Estate Board, supra,* 444 U.S. at 241. Because the court of appeals erroneously treated Guthrie's conduct as "in commerce," it affirmed his conviction despite the Government's failure to show that his local activities had any substantial effect on interstate commerce. This was error, calling for reversal.

D. The *Summit Health* Decision Has Not Solved the Problem.

In *Summit Health, Ltd. v. Pinhas,* 114 L. Ed. 2d 366 (1991), a 5-4 majority of the Court refused to dismiss on the pleadings a case concerning the denial of staff privileges to a single physician at one of a number of competing hospitals in the Greater Los Angeles area. The case continued the confusion whether and when the Sherman Act reaches local activities with insubstantial effects on interstate commerce.

Summit Health produced no rule that can be applied.[11] In lower-court cases involving medical staff privileges, *Summit Health* is simply being cited and the result followed without any attempt to follow or apply the analysis. *E.g., Austin v. McNamara,* 979 F.2d 728, 732 n.1 (9th Cir. 1992); *Oksanen v. Page Memorial Hospital,* 945 F.2d 696 (4th Cir. 1991). In all other types of cases, *Summit Health* is largely being ignored.[12] This Court's intervention continues to be needed to resolve the conflicts caused by *McLain* and to eliminate the confusion in the area generally.

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[11] *See Okusami v. Psychiatric Institute of Washington, Inc.,* 959 F.2d 1062, 1064 (D.C. Cir. 1992) (quoting Calkins, *supra* note 5: *Summit* "is subject to conflicting interpretations, and failed to resolve the tensions and correct the misunderstandings that underlie the interstate commerce requirement").

[12] It was not cited or discussed by the court below, for instance.

This case is an unusually apt candidate for the purpose. Unlike *McLain* and *Summit Health,* it does not arise on the pleadings. The facts are clear, simple, and undisputed. They squarely present the issue.

E. The Decision Below Trivializes the Sherman Act.

The significance of the error below was to federalize and criminalize conduct of a local nature which had at most an insubstantial impact on interstate commerce. The result is the trivialization of the Sherman Act. *See Summit Health Ltd. v. Pinhas,* 114 L.Ed.2d 366, 383-384 (1991) (Scalia, J., dissenting).

This particular case might be viewed as simply an aberrant instance of poor prosecutorial judgment, unlikely to be repeated. However, there is a grave potential for abuse of the Sherman Act in civil cases as well, as Congress has recognized.[13] In many of these cases there is no substantial threat to interstate commerce, and thus nothing implicating the genuine objects of the Sherman Act.

If it is now this Court's view that all economic transactions, including baby-sitting[14] and corner lemonade stands,[15] are sufficiently "in the flow of interstate commerce" that any agreement that restrains them is subject to the Sherman Act, no matter how localized the agreement or how insubstantial the effect on interstate com-

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[13] Concerns about abuse of the antitrust laws in medical peer-review cases were expressly behind the Health Care Quality Improvement Act, for instance. *See* 42 U.S.C. § 11101(4).

[14] "As a matter of practical economics," increased costs of baby-sitting could diminish parents' willingness to go out for meals or entertainment, affecting demand for related goods and services, some of which come from out of state. None of this means that a "conspiracy" by baby-sitters or those who engage them should be a subject of federal criminal prosecution.

[15] Here in Washington state, at least, all lemonade is made with out-of-state lemons.

merce, then the Court should say so. Whatever impact such a ruling would have on the dockets of the lower courts, it would at least resolve the conflicts and save these courts the trouble of parsing out the issue on a case-by-case basis, as this Court has directed be done. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 197 n.12 (1974).

On the other hand, if the Court remains of the view expressed in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 241-242 (1980), that the Sherman Act prohibition on "restraint of trade or commerce among the several States" means that the defendant's challenged activities must in fact be in or directed at interstate commerce or must have (or be intended to have) a substantial effect on such commerce, then the Court should make this fact clear.[16] Such a course would require reversal of the judgment below, which is inconsistent with this portion of *McLain*.[17]

The Court's intervention would also remedy an injustice to Mr. Guthrie. It was an abuse of prosecutorial discretion for the Government to employ the criminal process in such a trivial matter against someone who so evidently believed that his conduct was not only customary but entirely lawful. *See* note 1 above. "There is no reason for society to attach criminal sanctions or stigmas to men whose actions or intentions were not pro-

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[16] *See* Calkins, *supra* note 5, 60 Antitrust L.J. at 621 n.93, *quoting* former Deputy Solicitor General Easterbrook: "[I]f the Sherman Act exercises less than the whole national power, I hoped [when authorizing the *McLain* brief] the Court would say so and stop the pretense."

[17] There is general agreement that the *McLain* opinion is "singularly confusing." Calkins, *supra* note 5, 60 Antitrust L.J. at 621. The opinion has produced substantial conflicts in the lower courts. *E.g.*, Busey & Freeman, *supra* note 5, 60 Antitrust L.J. at 734; *Summit Health, Ltd. v. Pinhas*, *supra*, 114 L.Ed.2d, at 378-379 (Scalia, J., dissenting).

scribed." II Areeda & Turner, Antitrust Law ¶ 310 (1978).

F. This Case Presents Issues Similar to Those in United States v. Lopez, No. 93-1290, and May Be Affected by the Decision in That Case.

In *United States v. Lopez*, No. 93-1290, *cert. granted*, 62 U.S.L.W. 3690 (April 18, 1994), this Court agreed to consider whether Congress may constitutionally outlaw possession of firearms in the vicinity of a school, without more.

While *Lopez* and Guthrie's case differ in some respects —notably in the specificity with which Lopez's conduct is proscribed by the statute—the cases are similar in others. Congress made no finding in either case that the prohibited activities collectively had a substantial effect on interstate commerce. There was no proof of such an effect on the particular facts of either individual case.

In *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 197 n.12 (1974), this Court observed:

> The jurisdictional inquiry under general prohibitions like . . . § 1 of the Sherman Act, turning as it does on the circumstances presented in each case and requiring a particularized judicial determination, differs significantly from that required when Congress itself has defined the specific persons and activities that affect commerce and therefore require federal regulation. *Compare United States v. Yellow Cab Co.*, 322 U.S. 218 (1947), *with, e.g., Perez v. United States*, 402 U.S. 146 (1971); *Maryland v. Wirtz*, 392 U.S. 183 (1968); *and Katzenbach v. McClung*, 379 U.S. 294 (1964).

Decision of *Lopez* will presumably require analysis of the scope of Congressional power to proscribe local conduct without first finding an effect on interstate commerce from

the class of similar cases. Whatever the Court says on this subject will likely have a bearing on Guthrie's case.[18]

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending the decision in *Lopez*.

Respectfully submitted,

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[18] In Guthrie's case, however, there is the further issue whether Congress actually did proscribe the conduct in question, and not just whether it could have done so. *See Summit Health, Ltd. v. Pinhas, supra*, 114 L.Ed.2d at 377 (Scalia, J., dissenting).